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88-2095

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

1. Does the most likely potential entrant suffer antitrust injury when it is excluded from the market as the direct result of a merger which is illegal under the antitrust laws because it excludes that potential entrant from a highly concentrated market?

PARTIES TO THE PROCEEDING

Petitioner is Axis, S.p.A., an Italian closely-held corporation.

Respondent is Micafil, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Axis, S.p.A. ("Axis") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on March 24, 1989, which affirmed an order of the United States District Court for the Northern District of Ohio dismissing Axis' complaint against respondent Micafil, Inc. ("Micafil").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reproduced as Appendix A at 1a-14a, is reported at 870 F.2d 1105. The opinion of the United States District Court for the Northern District of Ohio entered on December 31, 1987, and reproduced as Appendix B at 15a-26a, is reported

at 681 F. Supp. 1271. The opinion of the District Court denying Axis' motion to reconsider was entered on February 24, 1988, and is reproduced as Appendix C at 27a-30a; it is not reported. The judgments of the Court of Appeals and the District Court are reproduced as Appendix D and Appendix E, respectively, at 31a-32a, and 33a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1989. This petition for a writ of certiorari was filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4, 7 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 18 and 26, are reproduced as Appendix F, at 34a-35a.

STATEMENT OF THE CASE

This case involves an acquisition which had the unquestioned effect of substantially lessening competition in the United States market for armature winding machines. One of only four competitors in the market was acquired by one of the two largest competitors, respondent Micafil. Moreover, as a direct result of the acquisition, competition was substantially lessened because petitioner Axis, the leading European competitor and most likely potential entrant into the United States market, was prevented from making that acquisition and thereby itself entering the market.

Petitioner brought an action alleging that the acquisition violated both Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1. Axis sought both damages pursuant to Section 4 of the Clayton Act, 15 U.S.C.

§ 15, and an injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, ordering Micafil to divest the illegally acquired patent licenses or to provide Axis with licenses directly under the Possis patents which Micafil owned. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1337 and 1331.

The district court concluded that Axis did not suffer antitrust injury, even though it was the direct and immediate target of the violation. The court of appeals affirmed.

The facts surrounding Axis' action are not contested. The court of appeals treated "the following facts as true":

"Armatures are necessary components of fractional power commutator motors used in most small household appliances. To manufacture armatures efficiently the manufacturer must use an armature winding machine. The [petitioner], Axis, is an Italian corporation that manufactures armature winding machines and sells them to electrical appliance manufacturers throughout Europe. The [respondent], Micafil, is a United States corporation that has manufactured and sold armature winding machines in the United States since 1985. Micafil is a wholly-owned subsidiary of Micafil, A.G., a Swiss corporation that manufactures and sells armature winding machines throughout Europe.

"An armature winding machine winds copper wire around an armature arm to form a coil. The machine attaches the wire to a commutator and then cuts the wire. In the 1970s Globe Tool & Engineering (Globe) and Possis Corporation (Possis) obtained United States patents on the only two wire cutting methods used in armature winding machines. In 1975 Globe and Possis granted each other a non-exclusive license 'to make, have made, use, lease and sell' devices and methods falling within the scope of their patents. Sometime later Possis granted similar licenses to Ott-A-Matic, Inc. (Ott) and Mechaneer, Inc. (Mechaneer). In 1985, prior to Micafil's entry into the market, four companies manufactured and sold armature winding machines in the United States: Possis, Globe, Ott and Mechaneer. Three com-

panies engaged in the same activities outside the United States: Axis, Micafil and Odawara, a Japanese corporation.

"Prior to 1985 Possis refused to grant a license to any of the foreign armature winding machine manufacturers though all three sought such licenses. In July 1985, however, Possis sold its assets, including the patents and licenses covering armature winding machines, to Micafil. Micafil then entered the U.S. market. Shortly thereafter Axis learned that Micafil was attempting to purchase Mechaneer. When the president of Axis approached Mechaneer to determine whether Mechaneer was for sale, that company's principals refused to discuss the possibility of selling to Axis because Mechaneer's negotiations with Micafil were almost complete. Micafil bought Mechaneer in September 1985. Axis was ready, willing and able to purchase Mechaneer for the same price that Micafil paid. The two purchases enable Micafil to control approximately 50% of the U.S. armature winding machine market (Possis had about 40% and Mechaneer about 10%).

"At some unspecified time Odawara purchased Ott. As a result of the various acquisitions, the number of armature winding machine manufacturers in the United States shrunk from four to three. These three competitors, Globe, Micafil and Odawara, now own all the patents and licenses governing the manufacture of armature winding machines in the United States." (Pet. App. 2a-3a)

In sum, in August 1985, there were four U.S. manufacturers of armature winding machines (Globe, Micafil, Mechaneer and Ott). Two of the U.S. manufacturers (Mechaneer and Ott) were ultimately available for purchase. There were two likely potential entrants—the two non-U.S. manufacturers (Axis and Odawara). As the district court assumed, Axis "would have acquired Mechaneer thereby gaining entry into the U.S. market had the defendant [Micafil] not acquired Mechaneer" (Pet. App. 24a). Thus, absent Micafil's purchase of Mechaneer, there would today be four significant competitors in the U.S. market, one of which would be Axis; instead there are three.

Micafil, by its earlier purchase of Possis, had obtained all of the patent rights it needed to compete in the U.S. market. It then purchased Mechaneer for $1 million; its own counsel stated in its brief (at p.14) in the court of appeals that Micafil had paid the $1 million for the patent licenses. Yet, Micafil did not obtain additional patent rights. To the contrary, Mechaneer's principal assets—its patent licenses—were totally superfluous to Micafil since they were the same patent licenses Micafil acquired from Possis. The only effects of Micafil's purchase of Mechaneer for $1 million were to eliminate the existing limited competition with Mechaneer and, more importantly, the substantial additional competition that would have followed Axis' entry into the U.S. market by Axis acquiring Mechaneer.[1]

Axis thereafter brought this action against Micafil alleging that the acquisition of Mechaneer violated Section 1 of the Sherman Act and Section 7 of the Clayton Act. Axis alleged that barriers to entry had been raised substantially and that it had been excluded from the U.S. market by the elimination of Mechaneer as a means by which it would have entered the U.S. market. The elimination of the substantial increase in competition that Axis would have brought to the U.S. market violated Section 7 of the Clayton Act (prohibiting acquisitions which "may substantially lessen competition" in a "line of commerce").[2]

The acquisition also violated Section 1 of the Sherman Act as an unreasonable restraint of trade.[3] There were no significant

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1 Micafil ensured that Axis could not enter by refusing to grant a license to Axis under the Possis patents which it had previously acquired.

2 Moreover, with the elimination of Mechaneer as a potential means for Axis to enter the U.S. market, the existing U.S. marketers could safely ignore Axis as a potential competitor, thereby eliminating the effect on the market from what this Court previously referred to as an "on-the-fringe potential competitor." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973).

3 Since Section 7 of the Clayton Act requires a plaintiff to show only a reasonable probability of a substantial lessening of competition, as

procompetitive effects from the acquisition; Micafil already owned the patents and licenses which were Mechaneer's principal assets. On the other hand, there was the obvious and very substantial anticompetitive effect of preventing Axis' substantial competition in the U.S. market.

Micafil moved to dismiss, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, contending that the injury alleged in Axis' complaint was not antitrust injury. The district court granted the motion. The court "assum[ed] that the plaintiff would have acquired Mechaneer thereby gaining entry into the U.S. market had the defendant not acquired Mechaneer" (Pet. App. 24a); nonetheless, the district court concluded that Axis' injury did not "flow[ ] directly from the alleged anticompetitive acts of the defendant." Rather, it concluded that Axis' "alleged injury would have occurred notwithstanding the defendant's alleged anticompetitive violations." (Pet. App. 24a)

Specifically, the district court concluded that Axis' "alleged injury could flow from at least two other sources." First, the court stated that the patents themselves were the real barrier to Axis' entry and that Axis "merely attempted to transform the patent barrier into an acquisition barrier." Second, the fact that Odawara bought Ott after Micafil had acquired Mechaneer "raises the inference that plaintiff's alleged injury may also be attributable to Odawara." (Pet. App. 25a)

On appeal, Axis argued that the "two other sources" of Axis' alleged injury were contrary to the facts alleged and were otherwise irrelevant. First, while Axis did not dispute that the market was highly concentrated and entry was limited to those with the necessary patent license, if Micafil had not acquired Mechaneer, Axis could *and* would have surmounted the patent barrier by purchasing Mechaneer for $1 million. After this "entry vehicle" was eliminated, the cost of entering the market

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opposed to the actual anticompetitive effect required by Section 1 of the Sherman Act, acquisitions are normally challenged only under Section 7. Nonetheless, this Court has held that Section 1 continues to apply to acquisition contracts. *See, e.g., United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964).

rose to the cost of "inventing around" the patents; thus, the barrier to entry (the cost of entering) was raised dramatically by Micafil's acquisition of Mechaneer.

Second, the reference to Odawara's acquisition of Ott proved far too much, for whichever of the two remaining potential competitors entered by acquiring Ott, the other would be excluded because Mechaneer had been bought by Micafil. Much as in the game musical chairs, removing one chair while there are still two players means inevitably that one will fail; it is the "illegal" removal of the chair rather than the greater dexterity of one of the two players that assures that one will be eliminated.

The court of appeals, after a lengthy summary of the parties' respective arguments, considered the relationship between the patent and antitrust laws. It concluded that Axis had not charged either patent misuse or attempt to monopolize in Micafil's acquisition of first Possis and then Mechaneer. (Pet. App. 13a) However, it did not conclude that all acquisitions of patents or patent licenses are exempt from Section 7 of the Clayton Act or Section 1 of the Sherman Act. Indeed, respondent never even suggested that such an exemption existed.

Instead, the court of appeals went on to affirm the dismissal in a brief conclusion, relying on *dictum* from this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Axis did not suffer antitrust injury, said the court of appeals, because it "would have suffered the same injury if Mechaneer had remained in business or if some entity other than Micafil had purchased Mechaneer. Perhaps a consumer or a competitor could state a claim for damages and injunctive relief on the basis of the Mechaneer acquisition, but Axis did not." (Pet. App. 14a)

REASONS FOR GRANTING THE WRIT

As this Court stated in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 536-37 (1983), it is "virtually impossible to announce a black-letter rule that will dictate the result in every case" as to "whether a party injured by an antitrust violation may recover treble damages." It is the "previously decided cases" that "identify factors" and "guide the exercise of judgment."

In no case has this Court considered whether a party excluded from the market by an illegal acquisition suffered antitrust injury that would allow it to bring an antitrust action attacking the illegal acquisition. This Court has considered the issue of antitrust injury in two merger cases, *Brunswick Corp. v. Pueblo Bowl-O-Mat*, *supra*, and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). But both cases involved a plaintiff which was an actual competitor in the market alleging "injury" from *increased* competition that would result from the illegal merger.

This Court has held that a competitor cannot attack a merger, no matter how illegal the merger may be, when the only alleged injury the plaintiff suffers results from an increase in legitimate competition. What remains to be determined is the proper rule where there is a substantial decrease in competition and the plaintiff is one whose injury is the exclusion from the market as a direct result of the acquisition. This question can arise in many acquisitions. The court of appeals' decision prevents suits by plaintiffs uniquely situated to pursue the procompetitive interests of the antitrust laws.

Moreover, the court of appeals' holding is not limited to mergers. It has created a rule of antitrust injury so narrow that it could have an adverse impact on most antitrust actions. The court below held that Axis failed to allege antitrust injury because it would have suffered the same injury under other possible facts, even though those facts are contrary to what the court assumed to be true. A rule which eliminates plaintiff's antitrust remedy where injury *might* have occurred in other cir-

cumstances, unrelated to an antitrust violation, would effectively eliminate many private antitrust actions, even for *per se* violations such as horizontal boycotts and horizontal price-fixing conspiracies.

I. The Court of Appeals Decided an Important Question of Law in Conflict With This Court's Decisions.

A. The Court of Appeals Misconceives *Brunswick* and Ignores *McCready* and *Cargill*.

In defining those persons who suffer antitrust injury, the court of appeals chose the most restrictive language from this Court's *Brunswick* decision and ignored this Court's own description of *Brunswick* in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Cargill*. This is strong evidence that this Court's "previously decided cases," two of which involved injury from increased competition, offer insufficient guidance to the lower courts in determining whether antitrust injury is suffered by those who are injured by being prevented—as a result of an illegal acquisition—from entering the market and increasing competition.

In *Brunswick*, the plaintiff Pueblo alleged that, absent Brunswick's acquisition of certain failing bowling centers, those bowling centers would have gone out of business and Pueblo's profits would have increased. Yet, the acquisition by Brunswick allegedly violated Section 7 of the Clayton Act not because the bowling centers stayed in business, but rather because the entry of Brunswick's "deep pocket" in local markets previously populated by relatively small competitors might ultimately lessen competition. 429 U.S. at 482.

This Court had no difficulty in holding that Pueblo could not recover treble the profits it would have made if the bowling centers had been allowed to go out of business. Pueblo's injury was the result of Brunswick's "preserv[ing] competition, thereby depriving respondents of the benefit of increased concentration." 429 U.S. at 488. This was not "*antitrust* injury": "injury of the type the antitrust laws were intended to prevent

and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489 (emphasis in original).

In discussing the relationship between Section 4, the private right of action, and Section 7 of the Clayton Act, which does not require any proof of a present anticompetitive effect, but rather "only that injury may result," this Court noted that Pueblo would have suffered the same injury if the bowling centers had obtained refinancing or had been acquired by some "shallow pocket" parent. 429 U.S. at 487. The court of appeals, in affirming the dismissal of Axis' action, concluded that this language controlled the claims of all potential entrants like Axis. (Pet. App. 14a)

In so holding, the court of appeals ignored this Court's explanation in *McCready* of the very passage from *Brunswick* upon which it relied. In *McCready*, the defendants also contended, relying on *Brunswick*, that the plaintiff had not suffered antitrust injury because she "would have suffered the identical 'loss'—but no compensable 'injury'—as long as her employer, which acted independently in an unrestrained market, continued to purchase a group insurance contract that did not cover the services of clinical psychologists." 457 U.S. at 480 n. 16. This Court rejected the defendants' argument. Rather, it concluded that the holding in *Brunswick* was based on "the general principle that treble-damage recoveries should be linked to the procompetition policy of the antitrust laws." 457 U.S. at 482. McCready's injury was recognized as antitrust injury because it "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." 457 U.S. at 484.

McCready is not the only decision of this Court that has interpreted *Brunswick* in this manner. In *Cargill, Inc. v. Monfort of Colorado, Inc.*, the plaintiff claimed that the allegedly illegal acquisition would injure it because the merged company would increase competition, thereby lowering the plaintiff's profits. This Court stated that in *Brunswick*, "[w]e held that this injury, although causally related to a merger alleged to violate § 7, was not an antitrust injury, since '[i]t is inimical to [the

antitrust] laws to award damages' for losses stemming from continued competition. *Id.* at 488." 479 U.S. at 109-10. Similarly, this Court found that Monfort's injury was not antitrust injury because "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury." 479 U.S. at 117.

However, this Court "decline[d] the invitation" of the United States to deny standing to competitors who actually alleged (and would prove) that the acquisition would result in predatory pricing. 479 U.S. at 121. While predatory pricing might be infrequent, a person threatened with being excluded from the market as a result of an acquisition that would lead to predatory pricing should not, this Court concluded, have its injuries ignored. This Court never suggested that the plaintiff would have to plead and prove that it could not have suffered the same injury without an antitrust violation.

The court of appeals' decision relies exclusively on the *dictum* from this Court's decision in *Brunswick*, simply ignoring this Court's subsequent discussion of the issue in *McCready* and *Cargill*. This Court should grant review to determine what factors the lower courts should consider when determining whether a plaintiff's injury is "antitrust injury" when the plaintiff alleges that an illegal acquisition has prevented it from entering the market and increasing competition.

B. The Court of Appeals Ignored the Loss of Increased Competition.

In concluding that Axis did not suffer antitrust injury, the court of appeals described the injury to competition from Micafil's acquisition of Mechaneer by ignoring both the allegations of the complaint and the prior decisions of this Court. The court of appeals concluded that "[w]hat made the acquisition illegal was that by acquiring Mechaneer, Micafil further reduced competition in an industry that was already served by very few manufacturers." (Pet. App. 13a)

The elimination of Mechaneer, however, had two distinct anticompetitive effects in violation of Section 7 of the Clayton

Act. The acquisition did eliminate the present competition provided by Mechaneer. But Mechaneer was a small competitor that did not have substantial market strength. The present competition provided by Mechaneer was not the most important anticompetitive effect of Micafil's action. Indeed, if only Mechaneer's own strengths were at issue, Micafil might have argued that Mechaneer was sufficiently small and underfinanced that acquiring it would not probably "substantially lessen competition" in violation of Section 7.

The more important effect on competition was that Micafil eliminated Mechaneer as a means by which a major competitor could enter the U.S. market for armature winding machines. If Axis, rather than Micafil, had acquired Mechaneer, competition would have increased substantially rather than decreased. The court of appeals simply ignored this Court's decisions which have recognized the importance of increased competition from expanding a small competitor. *See United States v. Aluminum Co. of America*, 377 U.S. 271, 279 (1964); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).[4]

The court of appeals' compounded its error by ignoring Axis' claim that Micafil's agreement to acquire Mechaneer also violated Section 1 of the Sherman Act. Under the standard set by this Court in *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-30 (1948), the question is whether the acquisition agreement was an unreasonable restraint of trade. The elimination of the substantial increase in competition that would have occurred absent respondent's acquisition is an obvious anticompetitive effect to be weighed in any Rule of Reason analy-

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4 Eliminating Mechaneer as a means by which Axis could enter the U.S. market for armature winding machines also eliminated the procompetitive effect that Axis may well have been exerting on the U.S. market by being on the "fringe" of the market, perceived by the market as likely to enter (by acquiring Mechaneer for instance) if the U.S. market failed to remain competitive. This Court recognized the substantial lessening of competition that may occur when the perceived potential entrant is eliminated in *United States v. Falstaff Brewing Co.*, 410 U.S. at 531-34.

sis. Indeed, the violation of Section 1 of the Sherman Act is based as much or more on the elimination of Axis' increase in competition as on the elimination of the present competition provided by Mechaneer.

II. The Court of Appeals' Decision Conflicts With the Decisions of Other Circuits.

The court of appeals concluded that a potential competitor which is excluded from the market by an illegal acquisition cannot bring an antitrust action because it did not suffer antitrust injury. Other Circuits have allowed exactly such plaintiffs to pursue their claims.

In *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), the plaintiff Helix had been a competitor, but its mill was destroyed by fire. It sought to re-enter the market by purchasing a mill that General Foods was offering for sale. Terminal, Helix' principal competitor, also sought to buy General Foods' mill. Helix sued alleging that the only means by which it could re-enter the flour market was by purchasing this mill. It also alleged that "but for the contract between Terminal and General [Foods], it would have purchased the . . . mill." 523 F.2d at 1319. The Ninth Circuit concluded that Helix had properly stated a cause of action under the antitrust laws.[5] While the issue of standing was only raised by implication, the Ninth Circuit recently confirmed that standing was found in *Helix. Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 453 (9th Cir.), *cert. denied*, 472 U.S. 1018 (1985).

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5 The Ninth Circuit found that Helix' claim under Section 1 of the Sherman Act was proper. The claim under Section 7 of the Clayton Act was dismissed only because the agreement between Terminal and General Foods was never consummated, a point which the Ninth Circuit believed was a necessary element for a damage action under Section 7. 523 F.2d at 1323.

Similarly, the Sixth Circuit's holding is in conflict with that of the Seventh Circuit in *Fishman v. Estate of Wirtz*, 807 F.2d 520, 532-35 (7th Cir. 1986). There, the Seventh Circuit held that a plaintiff suffered antitrust injury when its exclusion from the market was the result of an agreement in violation of Section 1 of the Sherman Act to acquire the assets the plaintiff sought as a means by which to enter the market.[6]

III. The Court of Appeals' Decision Bars the Most Appropriate Plaintiff From Enforcing the Antitrust Laws.

The private right of action is a fundamental part of antitrust jurisprudence. It exists to allow private parties to help in enforcing the antitrust laws. *Blue Shield of Virginia v. McCready*, 457 U.S. at 472-73. The availability of private enforcement is particularly important at a time when the budgets for the antitrust enforcement agencies—the Antitrust Division of the Department of Justice and the Federal Trade Commission—have been reduced substantially.[7] And the present case also reflects the difficulty of uncovering all illegal acquisitions: the Mechaneer acquisition was so small it fell below the Hart-Scott-Rodino Act reporting thresholds. Yet, small or local markets are frequently the ones in which barriers to entry (whether expressly or implicitly resulting from governmental rules, *e.g.*, patents) are most pervasive.

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6 The court of appeals in this action believed that its holding was supported by the Fifth Circuit's decision in *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984) (Pet. App. 11a). *Bayou Bottling* is factually distinguishable from the present action; it involved a dispute between two actual competitors, rather than an actual competitor and a potential competitor, over which should be allowed to buy a third. Thus, even if plaintiff Bayou prevailed, there would still only be two remaining bottlers in that market, as opposed to the present case in which Axis wishes to return the number of competitors to four. Nonetheless, the Fifth Circuit does rely on the same *Brunswick dictum* as the Sixth Circuit and, therefore, does conflict to some degree with the decisions of the Ninth and Seventh Circuits.

7 There was a "60% reduction in the antitrust division staff under Mr. Reagan." Wall Street Journal, June 16, 1989, at B12, col. 1.

The court of appeals has barred persons excluded from the market as a result of an illegal acquisition from bringing a private action to enforce the antitrust laws. The only plaintiffs that the court of appeals recognized "perhaps" could sue were "a consumer or competitor." (Pet. App. 14a) Neither group is likely to be preferable to the excluded potential entrant as an appropriate plaintiff to enforce the antitrust laws and enhance competition.

This Court has noted that consumers (*e.g.*, a customer) are often appropriate plaintiffs. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Consumers, however, are much less likely to bring an antitrust action chalienging even a clearly illegal acquisition than they would be to attack price-fixing. First, it may be virtually impossible for the consumer to prove any damages arising from an illegal acquisition. Prices may not increase for a substantial period of time. Indeed, it may be impossible ever to show a price increase resulting from the reduction in competition. Rather, the anticompetitive effect may be seen in a loss of competition in subjective factors, such as service, quality and the introduction of new products. It may even be difficult for a consumer to make a sufficient showing to support an injunction. Finally, in many commercial settings, a customer may have a substantial disincentive to sue a principal supplier alleging that its acquisition of another supplier violates the antitrust laws; a failure to prevail in the lawsuit might be followed by a refusal to continue to supply.

The other potential plaintiff cited by the court of appeals is the "competitor". This is extraordinary in light of the fact that in both cases in which this Court considered whether competitor-plaintiffs suffered antitrust injury from acquisitions (*Brunswick* and *Cargill*), this Court concluded that they did not. Indeed, the competitor will most likely not suffer injury when competition is reduced as a result of an acquisition. Existing competitors, like Pueblo Bowl-O-Mat and Monfort, will normally be willing to spend money to bring an antitrust action only when their injury results from increased competition. Thus, existing competitors are not likely potential plaintiffs

who can or will properly allege antitrust injury from an illegal acquisition.

In contrast, the potential competitor which is prevented from entering a market with high barriers to entry as a result of an illegal acquisition has both the financial incentive and the necessary procompetitive intent to bring a proper private antitrust action. The financial incentive is clear; it will seek to recover damages based on its inability to enter and compete in the market—that is, its lost profits. The procompetitive intent reflects the fact that it seeks to increase competition if it prevails by adding an additional, and in the case of Axis, substantial competitive input to the market.

The court of appeals holds out an ephemeral hope that some other appropriate private plaintiff will appear to enforce the antitrust laws. Certainly none has come forward in the four years since Mechaneer was acquired. Given the substantial barriers to entry and the level of concentration, Axis appears to be the only plaintiff likely to redress a clear violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act.

IV. The Court of Appeals' Holding Could Have a Widespread and Adverse Impact Eliminating Many Private Antitrust Actions.

The court of appeals denied Axis the right to obtain relief from its injury "because Axis would have suffered the same injury if Mechaneer had remained in business or if some entity other than Micafil had purchased Mechaneer." (Pet. App. 14a). However, as the district court assumed for purposes of the motion to dismiss, absent Micafil's acquisition of Mechaneer, Axis would have purchased Mechaneer and entered the U.S. market. (Pet. App. 24a)

According to the court of appeals, therefore, Axis did not suffer antitrust injury because, under hypothetical facts contrary to the facts alleged, Axis might have suffered the same injury without a violation of the antitrust laws having taken place. One of the facts this Court noted in *Brunswick* as reason

to be concerned whether Pueblo was an appropriate plaintiff (that it would have suffered the same injury under circumstances in which there was not an illegal acquisition—if the bowling centers had been acquired by "shallow pockets" or had obtained refinancing), is now a requirement for all private antitrust plaintiffs.

Antitrust injury is required for plaintiffs not only in actions brought under Section 7 of the Clayton Act, but also for claims alleging violations of Section 1 of the Sherman Act such as that in *McCready*. Indeed, the court of appeals affirmed the dismissal of Axis' claim under Section 1 of the Sherman Act because Axis purportedly did not suffer antitrust injury. According to the court of appeals, therefore, the antitrust plaintiff alleging injury from a violation of Section 1 must show that the same "injury" could not have resulted from any set of possible facts not involving an antitrust violation.

This definition of antitrust injury would surely eliminate many of the most common private antitrust actions. For example, a company that was the target of a boycott in *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941), or in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), would not have suffered antitrust injury when it was eliminated from the market. Pursuant to *United States v. Colgate & Co.*, 250 U.S. 300 (1919), each of the companies could have, without violating the antitrust laws, unilaterally determined to refuse to deal with the purchaser because they did not want to sell to those who aid design pirates or to an independent like Klor's. Under the test for antitrust injury stated by the court of appeals, the fact that they did act by agreement and not unilaterally is no more relevant than the fact that, absent Micafil's acquisition of Mechaneer, Axis would have purchased Mechaneer and entered the market.

Similarly, the victim of a price-fixing conspiracy will have to show that the participants in the conspiracy could not have individually arrived at the higher price charged. Each defendant confronted with the same inflationary cost pressures could have unilaterally decided to increase prices. Following the court of

appeals' decision in this case, it would be insufficient for the plaintiff to prove that there was no evidence to support such unilateral activity by the violators and that the evidence was to the contrary. Since the plaintiff "would have suffered the same injury" had the price-fixers acted unilaterally, plaintiff suffered no "antitrust injury."

A definition of antitrust injury which supports such a dramatic reduction in private rights of action merits this Court's immediate review.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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June 22, 1989

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 88-3113, 88-3245

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

AXIS, S.P.A.,
Plaintiff-Appellant,
v.
MICAFIL, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed March 24, 1989

Before: WELLFORD, Circuit Judge; PECK and LIVELY,* Senior Circuit Judges.

LIVELY, Senior Circuit Judge. This is an appeal from dismissal of an antitrust action pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. The question for decision is whether the injury claimed by the plaintiff in its complaint constitutes an "antitrust injury," a requirement for recovery of treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, and for injunctive relief under § 16 of the Clayton Act, 15 U.S.C.

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*The Honorable Pierce Lively became a senior judge on January 1, 1989.

§ 26. We conclude that the district court properly determined that the complaint failed to allege an antitrust injury, and affirm the judgment.

I.

A.

Since the district court rendered judgment at the pleading stage, we must accept as true the facts alleged in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Applying this standard, we treat the following facts as true.

Armatures are necessary components of fractional power commutator motors used in most small household appliances. To manufacture armatures efficiently the manufacturer must use an armature winding machine. The plaintiff, Axis, is an Italian corporation that manufactures armature winding machines and sells them to electrical appliance manufacturers throughout Europe. The defendant, Micafil, is a United States corporation that has manufactured and sold armature winding machines in the United States since 1985. Micafil is a wholly-owned subsidiary of Micafil, A. G., a Swiss corporation that manufactures and sells armature winding machines throughout Europe.

An armature winding machine winds copper wire around an armature arm to form a coil. The machine attaches the wire to a commutator and then cuts the wire. In the 1970s Globe Tool & Engineering Co. (Globe) and Possis Corporation (Possis) obtained United States patents on the only two wire cutting methods used in armature winding machines. In 1975 Globe and Possis granted each other a non-exclusive license "to make, have made, use, lease and sell" devices and methods falling within the scope of their patents. Sometime later Possis granted similar licenses to Ott-A-Matic, Inc. (Ott) and Mechaneer, Inc. (Mechaneer). In 1985, prior to Micafil's entry into the market, four companies manufactured and sold armature winding machines in the United States: Possis,

Globe, Ott and Mechaneer. Three companies engaged in the same activities outside the United States: Axis, Micafil and Odawara, a Japanese corporation.

Prior to 1985 Possis refused to grant a license to any of the foreign armature winding machine manufacturers though all three sought such licenses. In July 1985, however, Possis sold its assets, including the patents and licenses covering armature winding machines, to Micafil. Micafil then entered the U.S. market. Shortly thereafter Axis learned that Micafil was attempting to purchase Mechaneer. When the president of Axis approached Mechaneer to determine whether Mechaneer was for sale, that company's principals refused to discuss the possibility of selling to Axis because Mechaneer's negotiations with Micafil were almost complete. Micafil bought Mechaneer in September 1985. Axis was ready, willing and able to purchase Mechaneer for the same price that Micafil paid. The two purchases enabled Micafil to control approximately 50% of the U.S. armature winding machine market (Possis had about 40% and Mechaneer about 10%).

At some unspecified time Odawara purchased Ott. As a result of the various acquisitions, the number of armature winding machine manufacturers in the United States shrunk from four to three. These three competitors, Globe, Micafil and Odawara, now own all the patents and licenses governing the manufacture of armature winding machines in the United States.

B.

While alleging in its complaint that "the acquisition of Mechaneer by Micafil raised substantially the barriers to entry into the U.S. market for manufacture and sale of armature winding machines for all potential manufacturers, particularly Axis, and indeed, has prevented Axis' entry into the market," Axis also stated that "the Possis patents now owned

by Micafil" are "[t]he only thing[s] preventing" Axis' entry into the market. The complaint charged Micafil with violating the antitrust laws by acquiring Mechaneer because the acquisition brought about a substantial reduction of competition in the market. Axis also alleged that by reason of the acquisitions it had suffered lost sales and lost profits from winding machines that it would have sold in the United States had Micafil not purchased Mechaneer. In addition to treble damages under § 4, Axis sought an injunction under § 16 of the Clayton Act requiring Micafil either to divest itself of Mechaneer or to grant Axis express licenses to the Possis patents.

In granting Micafil's motion to dismiss, the district court assumed that the Mechaneer acquisition violated both § 1 of the Sherman Act and § 7 of the Clayton Act, as Axis claimed. Nevertheless, the court found that the complaint failed to state a claim because it did not allege an "antitrust injury." The court concluded that Axis would have suffered the same injury—exclusion from the U.S. market—if Micafil had not purchased Mechaneer. The Possis and Globe patents, not the purchase of Mechaneer, foreclosed Axis' entry into the market. Thus, the anticompetitive act of purchasing Mechaneer did not cause the plaintiff's alleged injury. The patents were an impenetrable barrier to the plaintiff's entry before Micafil purchased Mechaneer, and they remained as great a barrier afterwards. The district court also recognized that Odawara had been able to enter the U.S. market by purchasing Ott, an effort Axis apparently never made. This acquisition could have caused Axis' alleged injury. Thus, the court concluded, any injury that Axis may have suffered did not flow directly from Micafil's presumably unlawful act.

II.

The Clayton Act uses very broad language to describe who may bring private actions for antitrust violations. Section 4 states that "any person who shall be injured in his business

or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained." Section 16 provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws."

Despite the statute's all-encompassing language, the Supreme Court has determined that claims of injury by reason of antitrust violations are compensable only when the injury flows directly from the unlawful act. The Court noted in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), that "[t]he lower [federal] courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 263, n.14. In *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), after quoting *Hawaii v. Standard Oil Co.*, the Court stated that the question of whether a given plaintiff may recover for injury claimed to have been caused by an antitrust violation requires consideration of common law requirements for recovery of damages, such as causation, as well as the specific language of the antitrust laws. 459 U.S. at 535.

The Supreme Court subjected a § 4 claim for treble damages to this analysis in *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). That case involved the acquisition of failing bowling alleys by Brunswick, the giant in the bowling industry. Competitors of the acquired operations sued for treble damages, claiming that if Brunswick had not purchased the failing bowling alleys the alleys would have gone bankrupt. The plaintiffs claimed that as a result their business and profits would have increased. The Court assumed that acquisition of the alleys by the dominant actor in the industry violated § 7 of the Clayton Act by reducing competition, but determined that the acquisitions did not cause the plaintiffs' alleged losses. If any other solvent pur-

chaser had acquired the alleys, or if the alleys had been able to obtain financing sufficient to stay in business, the result would have been the same—the plaintiffs would have been denied the profits they anticipated from the alleys' failure. As the Court stated: "while respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Id.* at 488.

The Court defined this limitation on the right to recover treble damages for § 7 violations [acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly"] as follows:

> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. at 125.

Id. at 489 (emphasis in original) (footnote omitted).

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), the Supreme Court held that a plaintiff seeking injunctive relief under § 16 of the Clayton Act also must allege a threat of antitrust injury, that is, an injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Id.* at 113, quoting *Brunswick*, 429 U.S. at 489. Thus, to survive a motion to dismiss, it was necessary that Axis' claims for damages and for injunctive relief both allege antitrust injury.

III.

The parties repeat in this court the arguments they made in the district court. We will discuss the plaintiff-appellant's position in detail.

Axis insists that the district court misconstrued its complaint and misread decisions of the Supreme Court, this court, and other federal courts. Axis contends that the standard applied by the district court in this case would preclude almost all private antitrust actions. It interprets the district court opinion to hold that an antitrust plaintiff must show "not only that its injury flowed from the violation, but also that its injury could not have occurred under any alternative set of facts that did not include an antitrust violation."

A.

Axis argues for a very narrow application of *Brunswick*. The acquisitions of the failing bowling alleys by Brunswick increased or at least maintained the level of competition in the relevant market. From this fact, Axis argues that *Brunswick* never precludes recovery for failure to allege antitrust injury when the plaintiff claims that the challenged acquisition reduces competition. While the fact that Brunswick's acquisitions would not reduce competition was certainly an important element of the *Brunswick* decision, that was not the only decisive factor. For purposes of the present case, another element of the decision is equally important. Aside from the acquisitions' effect on competition, the Court found no antitrust injury because the plaintiffs' injury, while causally connected to the acquisitions, was not caused by "that which made the acquisitions unlawful." 429 U.S. at 488. The acquisitions were unlawful because Brunswick was the giant of the industry, and any acquisitions by it presumably would tend to reduce competition. However, it was not this potential reduction of competition that caused the plaintiffs' loss of anticipated profits. They would have suffered the

same injury if the failing alleys had been kept in operation by other means. *Brunswick* stands for a much broader principle than that to which Axis would restrict it.

Axis seeks to support its position by citing two of the Supreme Court's post-*Brunswick* decisions, one of which dealt with § 4 antitrust standing and the other with § 16 antitrust injury. Antitrust injury is a concept distinct from antitrust standing, but is an element in the determination of standing. Thus, even where there is antitrust injury, a plaintiff may be found to lack standing because other elements of the standing equation are missing. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n. 5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons."). The district court decided this case on the basis of a failure to show antitrust injury and did not consider any of the other elements required for standing. We will do the same, and we will examine the cited decisions to determine their applicability where only antitrust injury is in issue.

B.

Axis first relies on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which was a § 4 standing case ("The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the health insurance plan's failure to provide reimbursement for the costs of that treatment."). *Id.* at 467. Although the Court found that the plaintiff had suffered an antitrust injury, this finding was part of its larger standing determination. In discussing *Brunswick*, the *McCready* Court refused to limit its *Brunswick* holding to a requirement that to constitute antitrust injury the plaintiff's injury must " 'reflect the anticompetitive effect' of the alleged violation." *Id.* at 482. Instead, *McCready* left the

Brunswick requirement of "antitrust injury" unchanged. "Nevertheless, we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick* is one factor to be considered in determining the redressability of a particular form of injury under § 4." *Id.* at 483 n. 19.

Although not explicitly stated in the opinion, *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), was also a standing case. The Court did not base its rejection of the union's claim solely on the union's failure to allege antitrust injury. The Court considered several factors that are relevant to the determination of standing—"the nature of the [plaintiff's] injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the [plaintiff's] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy." *Id.* at 545. In the course of the *Associated General Contractors* opinion Justice Stevens noted that the Court had cited *Brunswick* in *McCready* to support its conclusion that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." *Id.* at 538, quoting *McCready*, 457 U.S. at 483. Nothing in *Associated General Contractors* detracts from the *Brunswick* holding with regard to the requirement of antitrust injury.

Axis also relies on *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). As we have noted, the Supreme Court in *Cargill* held that one seeking an injunction under § 16 of the Clayton Act to prevent a proposed merger must show a threat of antitrust injury. There the plaintiff alleged that the proposed merger would result in a concentration of economic power in the relevant markets, substantially lessening competition or tending to create a monopoly. The plaintiff further charged that this concentration would impair its ability to compete in those markets. Relying principally upon

Brunswick, the Court concluded that the threat of lost profits following the projected merger was not sufficient to show a threat of antitrust injury. *Id.* at 116-17.

Axis also contends that the district court erred in relying on *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 2830 (1988). Suit was filed in *Alberta Gas* to prevent the proposed acquisition of Conoco by Du Pont. Du Pont was the largest producer of methanol in the United States. Prior to the merger Conoco had planned to build a new plant for the production of methanol. The complaint stated that to stimulate demand for methanol while its plant was under construction, Conoco would buy methanol from the plaintiff and other producers and sell it on the merchant market. After the acquisition, Du Pont cancelled the plans for a new methanol plant. The plaintiff claimed direct injury from the loss of anticipated sales of methanol to Conoco. It claimed indirect injury from the loss of anticipated sales of methanol that would have resulted from the increased market activity induced by Conoco. The court held that the losses alleged by the plaintiff did not constitute antitrust injury.

The court assumed that the acquisition was illegal because it gave Du Pont the power to prevent Conoco from entering the methanol-producing industry as an independent competitor. In other words, it reduced competition in that industry. The court, however, found that the loss of anticipated sales from the cancelled "demand creation" activities of Conoco did "not flow 'from that which makes the defendants' acts unlawful.' " *Id.* at 1241, quoting *Brunswick*, 429 U.S. at 489. If another entity without Du Pont's market power had acquired Conoco and curtailed its methanol plans, Alberta Gas would have suffered the same injury. 826 F.2d at 1241-42. Although there are obvious differences between the present case and *Alberta Gas*, that decision does support the district court's conclusion here.

We have not found a helpful Sixth Circuit case. In *Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984), one of the plaintiff's claims for treble damages was based on the defendant's acquisition of competitors. The plaintiff claimed that the acquisitions eliminated the competitive pressures of the acquired companies, thus permitting the defendant to engage in other monopolistic acts such as unfair pricing, profit squeezing and predatory bidding. *Id.* at 1058. We held that this allegation was sufficient to satisfy the *Brunswick* requirement of antitrust injury. The injury resulted "from 'anticompetitive acts made possible' by the acquisitions." *Id.* at 1058, quoting *Brunswick*, 429 US. at 489. *Langenderfer* does not support Axis because Axis' exclusion from the United States armature winding machine market did not result from Micafil's acquisition of Mechaneer—the anticompetitive act. Before Micafil ever acquired Mechaneer, Axis was shut out of the desired market by the patents controlled by Possis and Globe and by the refusal of those companies to license to Axis.

In *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984), the plaintiff claimed treble damages for lost profits resulting from the defendants' interference with the plaintiff's attempt to purchase a competitor. The court found that the plaintiff's losses from its failure to acquire the target company did not constitute antitrust injury. Applying *Brunswick*, the court stated:

> Bayou would have suffered the identical loss of sales, and economies of scale if [the competitor] had retained his operation or if he had sold to a third party. The injury does not satisfy either prong of the *Brunswick* test; it is not the type of injury the antitrust laws were designed to prevent and it does not flow from that which ostensibly made the defendants' activities illegal.

Id. at 304. The district court applied the same analysis to Axis' claim in the present case.

C.

Many of Micafil's arguments appear to confuse antitrust injury with antitrust standing. This confusion occurs because the two concepts "share a common ingredient." *Triple M Roofing Corp. v. Tremco, Inc.*, 753 F.2d 242, 247 (2d Cir. 1985). The common ingredient is that both requirements limit "recovery to those who have been *injured by* restraint on competitive forces in the economy." *Id.*, quoting *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 758 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (emphasis added). Any inquiry to determine whether antitrust injury has been shown is more limited than one to determine whether the plaintiff has standing. The single determinant of antitrust injury is whether the plaintiff has suffered an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [a defendant's] act [ ] unlawful." *Brunswick*, 429 U.S. at 489. On the other hand, even if an antitrust injury is shown sufficiently, standing may be denied on the basis of other factors. The purpose of the additional inquiries is to confine recovery to cases that promote the congressional intent to ensure that consumers receive the benefits of competitive markets.

IV.

We agree with the district court. Viewing the complaint in the light most favorable to Axis, the complaint does not allege an antitrust injury. As Axis admitted in the complaint itself, the Possis and Globe patents precluded its entry into the U.S. market. The cases cited by Axis for the general proposition that a patent holder may violate antitrust laws by misusing his patents in an attempt to create an unlawful monopoly cast no light on the issue in this case. See *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

Our patent and antitrust laws seek to further different and opposing policies. Patent laws grant a monopoly for a limited time in order "[t]o promote the Progress of Science and useful Arts. . . ." U.S. Const Art. I, § 8, cl. 8. Antitrust laws, on the other hand, are designed to promote and protect competition in the marketplace. Thus, a lawfully acquired patent creates a monopoly that does not violate the antitrust laws. While patent abuse may constitute an antitrust violation, *United States v. Westinghouse Electric Corp.*, 648 F.2d 642, 647 (9th Cir. 1981), Axis did not allege that Micafil violated the antitrust laws by misusing its patents or licenses. It charged only that the acquisition of Possis and Mechaneer raised the barriers to its entry into the U.S. market.

This is not a case where a patent holder has attempted "to monopolize an industry by acquiring all present and future patents relevant to that industry." *Id.* Globe still owns patents and Odawara operates in the U.S. market under licenses granted by Possis to Ott prior to Odawara's acquisition of Ott. The charge that Micafil "raised the barriers" to Axis' entry into the U.S. market by acquiring Possis and Mechaneer fails to allege antitrust injury, however, since Micafil never dominated the U.S. market for armature winding machines as Xerox did the market for plain paper copying machines in *SCM Corp. v. Xerox Corp.* The *SCM* court carefully delineated the conditions under which the acquisition of patents may violate the antitrust laws and create antitrust injury for which damages may be awarded. 645 F.2d at 1205. Giving the complaint a most indulgent reading, Axis did not make such a claim in this case.

CONCLUSION

Axis alleged no more than a causal link between Micafil's acquisition of Possis and Mechaneer and its claimed injury. What made the acquisition illegal was that by acquiring Mechaneer, Micafil further reduced competition in an industry that was already served by very few manufacturers. As

did the plaintiffs in *Brunswick*, *Alberta Gas*, and *Bayou Bottling*, however, Axis would have suffered the same injury if Mechaneer had remained in business or if some entity other than Micafil had purchased Mechaneer. Perhaps a consumer or a competitor could state a claim for damages and injunctive relief on the basis of the Mechaneer acquisition, but Axis did not. The injury for which it sought relief was not inflicted by reason of Micafil's newly-acquired position in the market and the elimination of one competitor. The patents and licenses owned and possessed by three companies—Globe, Odawara and Micafil—not by Micafil alone, precluded Axis' entry into the U.S. market for armature winding machines. Thus, Axis' alleged injury is not "of the type the antitrust laws were intended to prevent" and it did not "flow from" the element of the acquisition that made it unlawful. *Brunswick*, 429 U.S. at 489.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C87-1956

Axis, S.p.A.,

Plaintiff,

vs.

Micafil, Inc.,

Defendant.

MEMORANDUM OPINION

I. INTRODUCTION.

DOWD, *J.*

This is an antitrust action filed by the plaintiff against the defendant for alleged violations under § 1 of the Sherman Act and § 7 of the Clayton Act seeking damages and equitable relief under §§ 4 and 16 of the Clayton Act. The plaintiff claims that it has suffered antitrust injuries as a result of the defendant's acquisition of two out of four U.S. armature manufacturing companies thus limiting the ability of the plaintiff to enter the U.S. market.

The defendant has moved the Court for a motion to dismiss asserting that the plaintiff has failed to allege the necessary element of an antitrust action that being an antitrust injury. The plaintiff has replied to the motion, and for the reasons that appear below, the motion is granted.

II. BACKGROUND.

Axis, S.p.A. ("Axis") is an Italian corporation organized under the laws of Italy with its principal place of business in Florence, Italy. The defendant Micafil, Inc. ("Micafil") is a corporation organized under the laws of the State of Delaware and is a wholly-owned subsidiary of Micafil A.G. ("Micafil A.G."), a corporation organized under the laws of Switzerland with its principal place of business in Zurich, Switzerland. Both companies are engaged in the manufacturing of electrical equipment, and specifically the manufacturing of armature winding machines.

Both the plaintiff and the defendant manufacture machines that are used in the manufacture of fractional power commutator motors. Household appliances such as vacuum cleaners, food processors, and electrical drills all include a fractional power commutator motor as its source of power. A necessary component of a fractional power commutator motor is an armature.

> An armature winding machine operates by spinning wires around a core, attaching them to a commutator tang and then cutting the wire to permit removal from the machine. Purchasors of such machines require that they incorporate a device to grip the wire and either break it or cut it, depending on the thickness of the wire and the ability of the breaking or cutting device to operate on it with precision. For many uses, a wire cutting device must be employed and no economically practical alternatives are available.

Complaint, ¶ 7.

> The ability to manufacture and sell armature winding machines with such cutting devices is essential to the sale of lines of equipment for the manufacture of electric motors. Manufacturers of such motors prefer to purchase manufacturing equipment which offer complete lines, including armature winding machines equipped with such wire cutting devices.

Id. at ¶ 8.

Prior to 1985, there were four manufacturers of armature winding machines in the United States: (1) Globe Tool & Engineering Co. ("Globe"); (2) Possis Corporation ("Possis"); (3) Ott-a-Matic, Inc. ("Ott"); and (4) Mechaneer, Inc. ("Mechaneer"). Since 1975, Ott and Mechaneer have manufactured and sold armature winding machines pursuant to licenses granted by Possis. Complaint ¶ 10. Globe and Possis manufacture and sell armature winding machines pursuant to a cross licensing agreement. Complaint ¶ 9. Before 1985, Axis and Micafil, A.G., the two principal manufacturer of armature winding machines in Europe, were foreclosed from manufacturing and distributing armature winding machines in the United States because of the patents and license agreements held by the United States companies. Complaint ¶ 14. Odawra, a Japanese company, is also a manufacturer of armature winding machines outside of the United States. *Id.*

In July of 1985, Micafil, A.G., through its wholly-owned subsidiary the defendant Micafil acquired all the assets of the motor equipment division of Possis. Complaint ¶ 15. The assets purchased by Micafil included the various patents and patent licenses covering armature winding machines. *Id.* At the time of the asset acquisition, Possis held a forty percent share of the U.S. market for armature winding machines.

In September of 1985, Micafil, A.G., through its wholly-owned subsidiary Micafil acquired all the assets of Mechaneer. The purchase included the patent licenses for the manufacture of armature winding machines from Globe and Possis. At the time of the acquisition, Mechaneer held a ten percent U.S. market share for armature winding machines. Complaint ¶ 17. Prior to Micafil's acquisition of Mechaneer, Axis became aware that Micafil intended to purchase Mechaneer. Axis contacted Mechaneer "to determine whether it was for sale." Complaint ¶ 16. The president of Axis "was advised that negotiations with Micafil had, in fact, reached the point where an acquisition by Micafil was likely and that Mechaneer, therefore, would not discuss a possible acquisition by Axis." *Id.*

At some point, the Japanese company, Odawra, acquired Ott and entered the U.S. market. Complaint ¶ 19.

The plaintiff instituted this action claiming that "the acquisition of Mechaneer by Micafil raised substantially the barriers to entry into the U.S. market for manufacture and sale of armature winding machines for all potential manufacturers, particularly Axis, and . . . has prevented Axis' entry into the market." Complaint ¶ 19. The plaintiff claims that it was ready and willing to acquire Mechaneer had it been allowed to do so. Specifically, the plaintiff alleges that "Axis was ready, willing and able to pay an equal price for the assets of Mechaneer purchased by Micafil as was paid by Micafil." Complaint ¶ 18. The plaintiff claims that had it been allowed to purchase Mechaneer, it would have been able to immediately enter the U.S. market for armature winding machines. Complaint ¶ 20. The plaintiff claims that "[t]he only thing preventing such an entry is the lack of licenses for the Possis patents now owned by Micafil." Complaint ¶ 20.

The plaintiff alleges that as a result of Micafil's acquisition of both Possis and Mechaneer: (1) the U.S. market for armature winding machines has become even more highly concentrated; (2) there are only three U.S. competitors rather than four competitors; (3) the barriers to entry in the U.S. market have been substantially raised by elimination of possible licenses and acquisition vehicles; (4) the "competition in the U.S. market for armature winding machines may be, and in fact has been substantially lessened in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 7 of the Clayton Act (15 U.S.C. § 18);" and (5) that Axis has suffered loss of profits and sales that it would have sold to U.S. manufacturers of fractional power motors. Complaint ¶ 22.

III. DISCUSSION.

In its motion to dismiss, the defendant claims that the plaintiff's complaint fails to state a claim because the plaintiff has failed to allege an antitrust injury. The defendant argues that the plaintiff's alleged injury is not "one that flows from the supposed anticompetitive effect of the challenged acquisitions." Defendant's Memorandum in Support of Motion, p.2.

The defendant claims that the plaintiff's alleged injury would have occurred regardless of the identity of the acquirer or whether an acquisition had occurred at all. Specifically, the defendant claims that, notwithstanding the acquisitions, the plaintiff would have been foreclosed from the U.S. market because Axis did not hold any patents or licenses for the manufacture of armature winding machines.

The plaintiff, on the other hand, claims that it has alleged an antitrust injury. The plaintiff argues that the complaint alleges that Micafil's acquisitions of Possis and Mechaneer resulted in substantially raised barriers and thereby decreased competition in the U.S. armature winding machine market. Moreover, as a result of that decreased competition and ability to enter the market, the plaintiff has suffered an injury. Further, the plaintiff argues that the injury is more than causally related to the acquisitions by Micafil and flows directly from the anticompetitive effect to the defendant's antitrust violations.

Section 4 of the Clayton Act provides for the recovery of treble damages for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C.A. § 15. Section 16 of the Clayton Act provides for injunctive relief "against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damages is granted by course of equity. . . ." 15 U.S.C.A. § 26. The plaintiff claims that the antitrust laws violated by the defendant include § 1 of the Sherman Act and § 7 of the Clayton Act. Section 7 of the Clayton Act provides that

> [n]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, *the effect of such acquisition may be substantially to lessen competition, or tend to create monopoly.*

15 U.S.C.A. § 18 (emphasis added). Section 1 of the Sherman Act provides that "[e]very contract, in the combination of the form of trust or otherwise, or conspiracy, the restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C.A. § 1.

A prerequisite to a private right of action under § 4 and § 16 of the Clayton Act is an antitrust injury. The resolution of what is an antitrust injury for purposes of § 4 and § 16 of the Clayton Act is a nebulous concept. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976), the Supreme Court held that

> for plaintiffs to recover treble damages on account of § 7 violation, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick, 429 U.S. at 489 (emphasis in original). In *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S. Ct. 484 (1986), the Court extended the same antitrust injury analysis to actions under section 16 of the Clayton Act. Moreover, the fundamental theme of an antitrust injury analysis is that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick*, 429 U.S. at 488, quoting *Brown Shoe Cop. v. United States*, 470 U.S. 294 (1962) (emphasis in original).

In addition to establishing antitrust injury under a § 4 analysis, the plaintiff must also establish standing. "A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." *Cargill, Inc.*, ____ U.S. at ____, 107 S. Ct. at 489, n.5. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Court considered the antitrust injury requirement under the

Brunswick analysis and also considered whether the plaintiff, notwithstanding antitrust injury, had sufficient standing to assert the claim. *See also Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983).

On a motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P. the district court must review the facts in the light most favorable to the plaintiff and accept those facts as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976); *Davis H. Elliot Co. v. Carribean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975). The defendant has moved the Court for a motion to dismiss pursuant to Rule 12(b)(6) on the basis that the plaintiff has failed to state an antitrust injury. Consequently, the only issue before this Court is whether the plaintiff has stated an antitrust injury and thus, for the purposes of this motion, the Court assumes that the defendant's acquisition of Mechaneer violates § 7 of the Clayton Act and § 1 of the Sherman Act as alleged in the complaint.

In support of its motion to dismiss, the defendant relies heavily on the proposition that any alleged injury attributed to an alleged violation of § 7 of the Clayton Act and § 1 of the Sherman Act is one that would have occurred notwithstanding the alleged violations. In other words, the plaintiff would be suffering the same injury had the defendant not acquired Mechaneer and Possis, or if the Mechaneer and Possis continued to operate in their previous capacities. Moreover, the defendant argues that the barriers to Axis' entry into the U.S. market are the patents and licences held by the Possis and Globe, and that notwithstanding the acquisition of Mechaneer Axis would still be barred from entry into the U.S. market because of its lack of patents or licenses. The defendant argues that the plaintiff readily admits that patents and licenses are a barrier to entry. Complaint ¶ 20. Thus, the defendant claims that the injury sustained by the plaintiff does not flow directly from the alleged violation, or the anticompetitive effect.

The defendants rely heavily on the Third Circuit Court of Appeals decision in *Alberta Gas Chemicals v. E.I. DuPont Co. De Nemours*, 927 F.2d 1235 (3rd Cir. 1987). *Alberta Gas* is a Canadian manufacturer of methanol. Conoco was an American

company with large resources of coal which planned to invest large sums of money to build a manufacturing plant in the U.S. that would transform its large coal reserves into methanol. As part of that plan, Conoco envisioned developing a large network of retail outlets to reach the ultimate consumer. *Alberta Gas*, 826 F.2d at 1235. Aware of Conoco's plan, Alberta Gas figured that Conoco would need to buy methanol from other suppliers such as Alberta Gas to supply its network of consumer outlets pending the completion of Conoco's proposed plant. Moreover, Alberta Gas was of the opinion that Conoco's efforts would eventually increase the overall demand for methanol and thus Alberta would benefit in the long run. *Id.* Prior to Conoco's imposition of the plan, DuPont acquired Conoco. DuPont was a manufacturer of methanol with a twenty-five to thirty percent share of the market in the U.S. at the time of the acquisition. After acquiring Conoco, DuPont cancelled the plan to invest in the coal/methanol producing plant. Thereafter, Alberta brought an action against DuPont claiming that Conoco's plan was terminated to protect DuPont's own monopoly in the U.S. market. The district court granted summary judgment in favor of the defendant and held that there was no antitrust injury resulting from DuPont's acquisition of Conoco. The district court and the circuit court for purposes of the motion assumed that the acquisition had violated the antitrust laws, and in that case § 7 of the Clayton Act.

The Third Circuit's opinion in *Alberta Gas* is an excellent review of the antitrust injury analysis and the standing analysis applied in antitrust actions. The *Alberta Gas* decision relies heavily on the proposition that alleged injury must relate specifically to the anticompetitive effect of the alleged antitrust violation. The Third Circuit stated that the "Clayton Act deterrence through compensatory provisions is aimed toward the directly harmful effects of an antitrust transgression. The statutory sanctions do not constitute a broad restitutionary scheme for injuries not closely related to the violation, but caused by other effects, desirable or not, of the illegal conduct." *Alberta Gas*, 826 F.2d at 1240 (citations omitted). The Third Circuit went on to hold that Alberta Gas' losses were not the result of the merger. "Alberta's alleged losses were neither connected with, nor

resulted from, DuPont's market power in the methanol-producing industry. That is clear because the *same harm would have occurred had any acquirer decided to curtail Conoco's production and marketing plans.*" *Alberta Gas*, 826 F.2d at 1241 (emphasis supplied). The Third Circuit also relied on *Brunswick* for the finding of no antitrust injury and states that "because Alberta's injuries would have ocurred absent a violation of § 7, they do not flow from the anticompetitive effects of the merger." *Alberta Gas*, 826 F.2d at 1242.

The defendants argue that *Alberta Gas* clearly establishes that there is no antitrust injury alleged because the plaintiff's injury would have accurred absent any alleged violation of § 7 of the Clayton Act or § 1 of the Sherman Act. The defendants argue that notwithstanding the acquisition of Mechaneer, the plaintiffs would still be barred from the U.S. market because Axis has no patents or licenses to produce armature winding machines in the United States. In sum, they argue that the alleged injury of the plaintiffs does not flow directly from the acquisition of Mechaneer, but rather its inability to develop new technology or obtain patents and licenses.

The defendant also relies on the *Brunswick* decision and the facts giving rise to that case. In *Brunswick*, a large manufacturer of bowling equipment acquired a number of failing bowling alleys in the plaintiff's market area. *Brunswick*, 429 U.S. at 479-80. The plaintiff brought an action under § 4 of the Clayton Act claiming that they were injured as a result of the defendant's acquisition of the failing bowling alleys. The plaintiff's claim that had the defendant not acquired the bowling alleys, the bowling alleys would have closed and the plaintiff would have realized increased sales and profits. The Court did not find antitrust injury because the defendant's actions resulted in increased competition. The *Brunswick* court relied on the *Brown Shoe* court and protected competition and not the competitors. *Brunswick*, 429 U.S. at 488. The defendant attempts to analogize the facts of this case to those of *Brunswick* and argues that the plaintiff cannot state an antitrust injury as a result of increased competition in the U.S. market.

The plaintiff's primary argument in opposition to defendant's motion to dismiss is that antitrust injury is a result of the

defendant's anticompetitive conduct. The plaintiff argues that the defendant's acquisition of both Mechaneer and Possis decreased the number of U.S. competitors from four to three. Moreover, the acquisitions gave Micafil at least a fifty percent share of the U.S. market for armature winding machines. The consolidation of two of the four competitors, according to the plaintiff, substantially reduced the ability of companies such as Axis to obtain a license to produce the armature winding machines. The plaintiff further argues that it would not be in the same position but for the acquisition of Mechaneer and Possis by Micafil. The plaintiff argues and alleges that had Micafil not purchased Mechaneer, the plaintiff would have been able to purchase Mechaneer and thus enter the U.S. market for armature winding machines. Accordingly, the plaintiff argues that their injury flows directly from the alleged anticompetitive conduct of the defendant.

The plaintiff also opposes the defendant's analogy of this case to the facts in *Brunswick*. The plaintiff argues that in *Brunswick* the focus was on increased competition whereas in this case the focus is on decreased competition. The plaintiff argues that as a result of the defendant's actions the U.S. market for armature winding machines has experienced a decrease in competition.

Construing the facts alleged in the complaint in a light most favorable to the plaintiff, the Court finds that the plaintiff has failed to allege an antitrust injury under § 4 and § 16 of the Clayton Act. Assuming an alleged violation of § 7 of the Clayton Act and § 1 of the Sherman Act, and even assuming that the plaintiff would have acquired Mechaneer thereby gaining entry into the U.S. market had the defendant not acquired Mechaneer, the Court finds that the plaintiff has failed to establish an antitrust injury. The plaintiff has failed to allege facts that establish that the alleged injury flows directly from the alleged anticompetitive acts of the defendant. The Court finds that the plaintiff's alleged injury would have occurred notwithstanding the defendant's alleged antitrust violations. Further, the Court finds that the plaintiff's alleged injury does not flow directly from the alleged anticompetitive act of the defendant.

The complaint itself establishes that the plaintiff's alleged injury could flow from at least two other sources. First, the plaintiff admits that the patents and licenses prevent its entry into the U.S. market. Complaint ¶ 20. The plaintiff summarily addresses the patent and license barriers in its reply memorandum in opposition to the defendant's motion to dismiss stating that

> [t]wo years ago there were four U.S. companies manufacturing and selling armature winding machines. To enter most U.S. markets, potential entrant need only set up sales and manufacturing force in the U.S. The market for armature winding machines, however, had additional barriers to entry which were quite high: the patents and the cross-license agreement. Absent a license from Globe and Possis, the only way to enter would be to develop an entirely new, non-infringing technology.
>
> In 1985-86, the patent barrier was, in effect, lowered when three of the U.S. companies decided that they would consider selling their respective businesses; *rather than needing a new technology, the entry barrier was the purchase price of one of these companies.*

Plaintiff's Reply Memorandum in Opposition to Defendant's Motion to Dismiss, p.1 (emphasis added). The plaintiff has merely attempted to transform the patent barrier into an acquisition barrier. Second, the entry of Odawra, the Japanese firm, raises the inference that plaintiff's alleged injury may also be attributable to Odawra.

IV. CONCLUSION.

The Court finds that the plaintiff's alleged injury would have occurred absent the alleged anticompetitive act of the defendant. Accordingly, the Court finds that the defendant's motion to dismiss for the failure of the complaint to allege an antitrust injury is well taken. This case is hereby dismissed.

IT IS SO ORDERED.

DAVID D. DOWD, JR.
David D. Dowd, Jr.
U.S. District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C87-1956

Axis, S.p.A.,

Plaintiff,

vs.

Micafil, Inc.,

Defendant.

ORDER

DOWD, *J*.

The Court has before it the plaintiff's motion to amend or vacate the Court's judgment entry of December 31, 1987 dismissing the plaintiff's complaint. In the alternative, the plaintiff seeks leave of Court to file an amended complaint. The defendant has opposed the motion, and for the reasons that appear below, the motion is denied.

On December 31, 1987, the Court found that the defendant's motion to dismiss for the failure of the complaint to allege an antitrust injury was well taken. The Court dismissed the plaintiff's cause of action under the same judgment entry. The plaintiff is now before the Court claiming that the Court should reconsider its judgment entry of December 31, 1987 and either vacate that judgment or permit the plaintiff leave to file an amended complaint.

The plaintiff offers two basic arguments in support of its motion for reconsideration. First, the plaintiff argues that the Court failed to view the evidence in a light most favorable to the plaintiff as required under a Rule 12(b)(6) motion notwithstanding the fact that the Court recognized the applicable standard. Second, the plaintiff argues that the Court failed to follow the law of antitrust as interpreted in the Sixth Circuit.

In regards to the plaintiff's first assertion, the defendant argues that the Court properly applied the standard of a Rule 12(b)(6) motion and viewed the facts alleged in the plaintiff's complaint in the light most favorable to the plaintiff. The defendant further argues that the Court went to great lengths in assuming facts pled by the plaintiff. However, the defendant notes that the Court declined to accept the plaintiff's argument that the facts pled permitted the Court to infer the existence of an antitrust injury. The defendant argues that the plaintiff is merely asserting arguments previously made in opposition to the motion to dismiss and that the standard of a Rule 12(b)(6) motion was properly applied.

The Court finds that the plaintiff's argument that the Court failed to apply the proper Rule 12(b)(6) standard is not well taken. The Court clearly identified and stated the standard to be applied on a Rule 12(b)(6) motion in its memorandum opinion and applied that standard throughout the opinion. The Court made permissible inferences where appropriate based upon the facts pled and the Court finds that such an application cannot be said to warrant a vacation of its earlier decision.

In regards to the plaintiff's argument that the Court failed to recognize the law as stated in the Sixth Circuit, the defendant argues that the primary case relied upon by the plaintiff, *Christian Schmidt Brewing Co. v. G.H. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir.) *cert. denied*, 469 U.S. 1200 (1985), was a factually different case than that from which was brought by the plaintiff. The defendant further argues that although plaintiff disagrees with the Court's analysis of the standing issue, disagreement alone does not provide for a proper basis for a motion for reconsideration.

The Court finds that the plaintiff's argument regarding its failure to apply the law of the Sixth Circuit is not well taken.

The Court applied the law of antitrust injury under the guidelines established by the United States Supreme Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S. Ct. 484 (1986) and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976). Further, although the plaintiff would rather have had the Court rely on *Christian Schmidt Brothers*, the Court found that the analysis presented in *Alberta Gas Chemicals v. E.I. DuPont Co. de Nemours*, 927 F.2d 1235 (3rd Cir. 1987) to be more applicable to the case at hand. Accordingly, the Court finds that the plaintiff's argument that the Court failed to follow relevant Sixth Circuit precedent not to be well taken.

The Court finds that the plaintiff's motion for reconsideration and vacation of the judgment entry of December 31, 1987 to not be well taken. The plaintiff has asserted substantially similar arguments in the motion for reconsideration that were presented in opposition to the motion to dismiss and the Court finds that they raise no new issues of law or fact which would require the Court to vacate its earlier holding.

As an alternative to the vacation of the December 31, 1987 judgment entry, the plaintiff seeks leave of Court to file an amended complaint. The plaintiff asserts that an amended complaint would remedy any defect in pleading. The defendant on the other hand argues that the complaint was dismissed, not on the basis that facts were not pleaded, but on the basis that the facts alleged did not amount to an antitrust injury. The Court agrees and finds that the plaintiff's motion for leave to file an amended complaint is not well taken. The Court has already addressed and resolved the issue of antitrust injury based upon the facts alleged and finds that any further pleading will not state a claim upon which relief can be granted. Furthermore, the plaintiff has failed to provide the Court with a proposed amended complaint asserting new or omitted facts.

For the reasons that appear above, the Court finds that the plaintiff's motion for reconsideration and/or vacation, modification of relief from the judgment entry of December 31, 1987 is not well taken. Accordingly, the motion is denied.

IT IS SO ORDERED.

DAVID D. DOWD, JR.
David D. Dowd, Jr.
U.S. District Judge

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NORTHERN DISTRICT OF OHIO
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APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 88-3113/3245

AXIS, S.p.A.,

Plaintiff-Appellant,

v.

MICAFIL, INC.,

Defendant-Appellee.

Before:

WELLFORD, *Circuit Judge*; and
PECK and LIVELY*, *Senior Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized

* The Honorable Pierce Lively became Senior Circuit Judge January 1, 1989.

below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

By: /s/ LEONARD GREEN
Leonard Green
Clerk

Issued as Mandate: April 20, 1989

A True Copy.

COSTS: None
Filing fee .....$
Printing .....$
Total.....$

Attest:

By: /s/ [ILLEGIBLE]
[Illegible]
Deputy Clerk

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FILED
MARCH 24, 1989
LEONARD GREEN,
Clerk

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C87-1956

Axis, S.p.A.,

Plaintiff,

vs.

Micafil, Inc.,

Defendant.

JUDGMENT ENTRY

DOWD, *J*.

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendant's motion to dismiss for the failure of the complaint to allege an antitrust injury is well taken. This case is hereby dismissed.

By: /s/ DAVID D. DOWD, JR.
David D. Dowd, Jr.
U.S. District Judge

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AKRON

APPENDIX F

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part: "Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 7 of the Clayton Act, 15 U.S.C. § 18, provides in pertinent part: "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in pertinent part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against

damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: . . . ."

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 88-2095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED

Does an Italian manufacturer of machines, foreclosed from selling in the United States market because it lacks a necessary patent, suffer antitrust injury when a patent holder allegedly lessens competition in the market by acquiring one of two of its available licensees, even though the Italian company suffered no loss from the alleged lessening of domestic competition?

RULE 28.1 LISTING

Respondent Micafil, Inc., a Delaware corporation, is a wholly owned subsidiary of ASEA Brown Boveri, Inc., a Delaware corporation, which is a wholly owned subsidiary of ABB ASEA Brown Boveri, Ltd., a Swiss corporation, 50% of the stock of which is owned, equally, by two publicly traded corporations, ASEA AB, a Swedish corporation, and BBC Brown, Boveri & Co., Ltd., a Swiss corporation. Respondent is affiliated with Micafil, A.G., a Swiss corporation, which is an indirect wholly-owned subsidiary of ABB ASEA Brown Boveri, Ltd., the Swiss corporation referred to above.

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Rule 12(b)(6), Federal Rules of Civil Procedure 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-2095

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Micafil, Inc. respectfully requests this Court to deny the Petition For Writ of Certiorari seeking to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

A Writ of Certiorari should be denied since the Court of Appeals' decision is consistent with decisions of this Court, does not conflict with decisions of other Circuits and does not raise an issue of general effect or application.

This case involves an Italian manufacturer of machinery, foreclosed from selling in the United States because it lacks a necessary patent license. It seeks to recover treble antitrust damages from a patent holder which acquired one of its own two domestic licensees.

Both the District Court and the Court of Appeals held that the Italian manufacturer, petitioner Axis, S.p.A., had not suffered "antitrust injury" and could not assert an antitrust claim. Both courts reasoned that the injury which Axis complains of—its inability to sell machines in the United States—was attributable to the patent barrier, and not to any lessening of competition within the United States, the alleged violation of the antitrust laws.

The courts below observed that prior to 1985 there were three foreign manufacturers of machines subject to the patents (armature winding machines), Axis, Micafil, A.G. (an affiliate of Respondent Micafil, Inc.) and a Japanese manufacturer, Odawara. All were foreclosed from the American market by the patent barrier. Micafil and Odawara entered the United States market by making acquisitions of patent holders or licensees, which Axis also had the opportunity to do.

In holding that under these circumstances Axis had not suffered "antitrust injury", the Court of Appeals, as well as the District Court, followed this Court's teachings in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), that under Clayton Act §§ 4 and 16 a putative antitrust plaintiff must show that his injury was "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." 429 U.S. at 489; 479 U.S. at 109. Under *Brunswick* and *Cargill*, Axis' injury did not flow "from that which [made Respondent's] acts unlawful"—the lessening of competition within the United States—but from the patent barrier itself.

In seeking Certiorari, Axis essentially argues that the Court of Appeals erred in its interpretation of *Brunswick* and *Cargill*, positing instead an excruciatingly narrow reading of those deci-

sions. In doing so, Petitioner misconstrues the proper purpose of a petition for writ of certiorari, which is not to seek the correction of lower courts' errors.

Axis also urges in this Court (as it did below) a case which is significantly different from that presented in the complaint, and on that basis claims that it presents matters of great general import meriting this Court's review. While for present purposes the facts alleged in the complaint must be taken as true (the Complaint having been dismissed for failure to state a claim), Axis goes far beyond those allegations in attempting to make a case in this Court.

The complaint alleges that prior to 1985, there were three foreign manufacturers of armature winding machines, all foreclosed from the United States market because of their lack of U.S. armature winding machine patents or licenses: Axis, Micafil, A.G., and Odawara. At that time, there were four manufacturers of armature winding machines in the United States under the patent umbrella: Globe Tool & Engineering Company ("Globe") and Possis Corporation ("Possis"), which had granted each other non-exclusive licenses to make armature winding machines with patented wire cutting methods, and two licensees under Possis' patents, Ott-A-Matic, Inc. ("Ott") and Mechaneer, Inc. ("Mechaneer"). Prior to 1985, all three foreign manufacturers had attempted to obtain licenses from Possis, and all had been rebuffed.

In July 1985, Respondent Micafil, Inc. purchased substantially all of the assets of the motor equipment division of Possis, which included the various patents and patent licenses covering armature winding machines. Axis then learned that Respondent Micafil was attempting to purchase Mechaneer, and its president approached Mechaneer to determine whether it was available for purchase. Mechaneer's principals refused to discuss a purchase by Axis since negotiations with Micafil had progressed to the point that a sale was likely. In its complaint, Axis alleges that it was willing to pay a price for Mechaneer equal to that which Micafil was offering, but Axis does not allege that it

made an offer to purchase Mechaneer, at that price or a greater one.

In September 1985, Micafil purchased substantially all of the assets of Mechaneer for approximately $1 million, including the armature winding machine patent licenses. Axis claims that Possis' share of the American market for armature winding machines was approximately 40% and that Mechaneer's share of the market was at least 10%.

Subsequently, Odawara entered the United States market for armature winding machines by purchasing Ott. There is no allegation that Axis attempted to acquire Ott or attempted to acquire the other patent holder, Globe.

Axis commenced this action in July 1987 alleging that Micafil had violated Sherman Act, § 1, 15 U.S.C. § 1, and Clayton Act, § 7, 15 U.S.C. § 18, by acquiring Mechaneer because the acquisition brought about a substantial reduction of competition within the United States market for armature winding machines. Axis alleged that Micafil's acquisition of Mechaneer had raised substantially the "barriers to entry" into the American market for all potential manufacturers of armature winding machines, particularly Axis, and had prevented Axis' entry into the market. Axis further alleged (Complaint, ¶ 20) that "the Possis patents now owned by Micafil" are "[t]the only thing[s] preventing" Axis' entry into the United States market. Axis asserted that but for Micafil's acquisition of Mechaneer Axis would have acquired Mechaneer, a patent license and the right to sell its machines in the United States. While Axis states in its Petition (Pet. at 5, ftnt. 1) that "Micafil ensured that Axis could not enter by refusing to grant a license to Axis under the Possis patents which it had previously acquired," the complaint contains no such allegation.

Similarly, the Complaint does not allege, as the Petition suggests (p. 5), that Micafil's acquisition of Mechaneer violated § 7 of the Clayton Act because it eliminated "the substantial increase in competition that Axis would have brought to the U.S. market." (Pet. at 5) Had Axis acquired Mechaneer, of course, it would not have *increased* competition, for there

would have remained four manufacturers in the United States market, the same number there had been prior to Micafil's acquisition of Mechaneer.

Micafil moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on the grounds that, even if its acquisition of Mechaneer had violated the antitrust laws, Axis had suffered no "antitrust injury" as a result, under this Court's decisions in *Brunswick* and *Cargill.* Clayton Act §§ 4 and 16, 15 U.S.C. §§ 15, 26. Specifically, Micafil argued that Axis' "injury"—its exclusion from the United States market—was due to the existence of the patent barrier, as Axis admitted in its complaint, and did not "flow[s] from that which makes defendants' acts unlawful.", *Brunswick*, 429 U.S. at 489. The District Court agreed, dismissing the complaint for failure to allege antitrust injury, and the Court of Appeals affirmed on the same grounds.

While Axis in its Petition states that the Court of Appeals affirmed dismissal of the complaint "in a brief conclusion relying on *dictum*," (Pet. at 7) the Court of Appeals' decision carefully analyzed the complaint, this Court's decisions, its own and those of the other Circuits, giving close attention to Axis' arguments. Indeed, all the arguments which Axis raises here were resolved by the Court of Appeals.

Noting that Axis admits in its complaint that the patent barrier foreclosed its entry into the market, the Court of Appeals ruled that Axis' exclusion from the market did not arise because Micafil's acquisition of Mechaneer "brought about a substantial reduction of competition *in the market.*" 870 F.2d at 1106. (Emphasis supplied) Thus, the Court of Appeals found that Axis' exclusion from the market did not "flow" from "that which made the defendants' acts unlawful," as required by *Brunswick* and *Cargill.*

The litmus test applied by the Court below to determine whether the injury "flowed" from "that which made the defendants' acts unlawful" was whether Axis' injury would have been suffered irrespective of the illegality of the challenged activity. Here, Axis' injury arose because it lacked patents, not

because of the alleged illegality. ". . . Axis would have suffered the same injury if Mechaneer had remained in business or if some entity other than Micafil had purchased Mechaneer." 870 F.2d at 1111. Thus, Axis' alleged injury "did not 'flow from' the element of the acquisition that made it unlawful." 870 F.2d at 1112. In so holding, the Court of Appeals expressly relied on this Court's holdings and reasoning in *Brunswick* and *Cargill*, and decisions reaching the same result in analogous cases by the Third Circuit, in *Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3rd Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 2830 (1988), and the Fifth Circuit, in *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision faithfully followed this Court's teachings in *Brunswick* and *Cargill* and is fully consonant with the decisions of every other Circuit which has addressed the requirement of "antitrust injury." Even more, although the petition fails to reveal it, the rule applied and reasoning of the Sixth Circuit below are identical with those in similar cases of the Third, Fifth and Eighth Circuits. Indeed, Axis is so bereft of authority that, in its attempt to show a conflict between the Circuits, it has turned to a pre-*Brunswick* case, which did not even address "antitrust injury," and an inapposite decision of the Seventh Circuit.

Nor is this case one of broad applicability which has an effect far beyond the immediate parties. No "new rule" was created by the Court below, as Axis contends (Pet. at 8). Indeed, just as Axis' argument that the Court of Appeals erred in construing *Brunswick* rests upon an unreasonably narrow reading of that case, its attempt to make this case one of sufficient universiality to merit this Court's review bends the facts of the case and the decision of the Court of Appeals beyond recognition.

This is not a case "where there is a substantial decrease in competition and the plaintiff is one whose injury is the exclu-

sion from the market as a direct result of the acquisition." (Pet. at 8). This is a case where an Italian company, foreclosed from the market because of a patent barrier, remained in that position after one of two available patent licensees in the market was acquired, allegedly in violation of the antitrust laws. The exclusion from the market pre-existed the challenged acquisition of one of the patent licensees, and also continued after the other patent licensee—which Axis could have acquired and by that entered the market—was acquired by Axis' other competitor, Odawara. The Court of Appeals' holding manifestly has not "created a rule of antitrust injury so narrow that it could have an adverse impact on most antitrust actions." (Pet. at 8). To the contrary, it is self-evident that the very uniqueness of these facts make this case an unlikely candidate for general application, and thus an inappropriate one for this Court's review.

I. THE COURT OF APPEALS' DECISION IS IN HARMONY WITH THIS COURT'S DECISIONS IN *BRUNSWICK, CARGILL* AND *McCREADY*

The foundation of the Court of Appeals' decision was this Court's rule in *Brunswick* that a putative private antitrust plaintiff must plead and prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (emphasis in original) 429 U.S. at 489. The injury to plaintiffs in *Brunswick* may have been caused by the continued existence of the failing bowling alleys, but it did not "flow from" the lessening of competition which made the failing bowling alleys' acquisition by the dominant Brunswick unlawful under Section 7 of the Clayton Act. As this Court noted, the plaintiffs "would have suffered the identical 'loss'—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents . . . ." 429 U.S. at 487.

Thus, the Court of Appeals' decision below, finding that Axis has not suffered antitrust injury here is not merely consistent with this Court's reasoning in *Brunswick*—it is precisely

the same—"Axis would have suffered the same injury if Mechaneer had remained in the business or if some entity other than Micafil had purchased Mechaneer." 870 F.2d at 1111 (Pet. 14a). Certainly, the Court of Appeals created no new rule or reasoning.

Axis' narrow reading and its attempt to reduce *Brunswick* to the self-evident proposition that the antitrust laws do not protect a competitor from increased competition (Pet. at 8), ignore entirely this Court's analysis and presumes that this Court would have granted certiorari and rendered its decision only to restate the obvious. There is nothing in *Cargill* or *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) which supports Axis' argument that *Brunswick* was so limited. To the contrary, this Court in *Cargill began* its analysis by reaffirming *Brunswick* and its rule that an antitrust injury must be one "that flows from that which makes the defendants' acts unlawful." 479 U.S. at 109.

Axis' reference (Pet. at 11) to this Court's statement in *Cargill* (479 U.S. at 121) that it declined the Government's *amicus curiae* request to adopt a "*per se*" rule "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories," does not aid Axis in its position that it has suffered antitrust injury. Even if predatory conduct were to be treated differently, that has no bearing here. Axis' complaint makes no allegation of any predatory practice by Micafil.

The Court of Appeals decision is consonant as well with *McCready*. This Court stated there ". . . we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4." 457 U.S. at 483, n.19. That this Court found the *McCready* plaintiff had suffered antitrust injury does not advance Axis' argument. Unlike Axis, Ms. McCready was in the market as a consumer whose choice of professionals to render service had been unlawfully limited by an agreement to restrain trade.

Unlike Axis, her injury "flowed from that which made the defendants' acts unlawful."

Axis' statement (Pet. at 12) that the Court of Appeals "ignored" *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964), *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973) and *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), is misplaced. None of those cases even suggested that a private party, outside the market, can bring a private antitrust action for a lessening of competition within the market or for the foreclosure of an increase of competition within the market. The cases cited were actions by the Government challenging mergers which lessened competition in violation of Clayton Act § 7, they pre-dated *Brunswick* and did not address antitrust injury or standing.

II. THE COURT OF APPEALS' DECISION IS FULLY CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

Every Circuit which has addressed the question of "antitrust injury" in a factually pertinent case has come to the same conclusion as did the Court of Appeals for the Sixth Circuit in this case. The "conflict" which Axis claims to find among the circuits is simply non-existent.

In *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 2830 (1988), a case expressly relied on by the Court of Appeals below but passed over in silence by Axis, the Third Circuit affirmed the dismissal of a claim, where as here, plaintiff's injury would have occurred irrespective of the illegality of the challenged acquisition. There, a producer of methanol challenged the acquisition of Conoco by Du Pont, the largest producer of methanol in the United States, alleging that the acquisition violated Clayton Act Section 7 because it reduced competition in the sale of methanol. Plaintiff claimed two injuries. First, after Du Pont acquired Conoco, Conoco no longer purchased methanol from plaintiff and plaintiff lost the profits from those lost sales. Second, plaintiff alleged that after

the acquisition Conoco abandoned plans to stimulate the demand for methanol, pending completion of its own methanol plant, by purchasing methanol from plaintiff and others and selling it on the merchant market. Plaintiff claimed that Conoco's abandonment of the program to generate additional demand for methanol caused plaintiff to lose the methanol sales that that demand would have created.

The Third Circuit, following *Brunswick*, found that plaintiff had not suffered an antitrust injury because its injuries did not flow from "that which makes the defendants' acts unlawful." 826 F.2d at 1241. In reasoning identical to the Court of Appeals in this case, the Third Circuit explained, "That is clear because the same harm would have occurred had any acquirer decided to curtail Conoco's production and marketing plans. For example, a non-methanol producing company whose merger would not pose antitrust problems, . . ." 826 F.2d at 1241.

The Fifth Circuit, in *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984), held that a soft drink wholesaler and distributor did not suffer antitrust injury when a bottler it was seeking to acquire was acquired instead by a competitor, allegedly in violation of Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act. As Axis does here, plaintiff there claimed "an antitrust injury because it was prevented from acquiring [the target], an acquisition which would have improved its business position and increased its profits." 725 F.2d at 304. And just as the Sixth Circuit below rejected that argument by Axis here, the Fifth Circuit in *Bayou Bottling* stated, "this assertion of antitrust injury is foreclosed by the holding in *Brunswick*." 725 F.2d at 304. The Fifth Circuit's reasoning and application of *Brunswick* were the same as the Sixth Circuit's here: "Bayou would have suffered the identical loss of sales, and economies of scale if [the target] had retained its operation or if he had been sold to a third party." 725 F.2d at 304.

And recently, the Eighth Circuit, in *State of South Dakota v. Kansas City Southern Industries, Inc.*, 1989-1 Trade Reg. Rep. (CCH) ¶ 68,635 (8th Cir. June 29, 1989), held that the State of

South Dakota had not suffered antitrust injury and had no standing to challenge a conspiracy among railroads to drive out of business a coal slurry pipeline with which the State had a water supply contract. The injury claimed was the loss of profit on the water supply contract which the pipeline had to terminate because of the conspiracy.

The Eighth Circuit found that South Dakota was not an actual participant in the coal transportation market, just as Axis was not an actual participant in the United States armature winding machine market. *Id.* at 61,352. Interpreting *Brunswick* in exactly the same fashion as the Sixth Circuit did in this case, the Eighth Circuit held that while South Dakota may have suffered injury by defendants' anti-competitive actions, South Dakota's "injuries did not result from the *anti-competitive nature* of these practices." *Id.* at 61,353 (emphasis supplied). The Eighth Circuit's reasoning also was exactly the same as the reasoning of all other Circuits on the question. "The loss of future revenues clearly flowed from the cancellation of the contract rather than from injury to competition in the market in which it was involved. [citations omitted]. It is evident that South Dakota would have suffered an identical loss in the event that the [defendant] railroads had done nothing and [the pipeline] had simply decided to terminate the SDCD/ETSI contract for some other reason." *Id.* at 61,353.

In short, far from there being a conflict between the Circuits on the issue presented in this case, they have unanimously applied the same reasoning, and interpreted *Brunswick* in precisely the same way, as did the Sixth Circuit here.

Axis' authority to support its contention that there is a conflict among the Circuits is the 1975 pre-*Brunswick* decision in *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) and the Seventh Circuit's factually inapposite decision in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986). *Helix* did not even address standing or "antitrust injury", but accepted a "but for" causation theory—a theory expressly rejected in *Brunswick*. (". . . [an antitrust plaintiff] must prove more than

injury causally linked to an illegal presence in the market." 429 U.S. at 489).

In *Fishman*, a purchaser of the Chicago Bulls professional basketball team could not obtain League approval of the sale because of defendants' predatorily motivated refusal to deal which denied plaintiff use of an arena. Unlike Axis here, who was free to compete at all times for the purchase of Mechaneer and Ott (and thus enter the United States market) the predatory efforts of the *Fishman* defendants "effectively cut-off all competition for the acquisition of the Bulls franchise and injured plaintiffs as a result." 807 F.2d at 533. There is not the slightest suggestion that a plaintiff who could freely compete for entry into the market, and who is not the object of predatory practices, would suffer antitrust injury.

III. THE COURT OF APPEALS' DECISION, CONSONANT WITH EXISTING LAW, DOES NOT PRESENT AN IMPORTANT ISSUE REQUIRING THIS COURT'S REVIEW

While admittedly important to the parties, it is respectfully submitted that the issue of whether Axis has suffered "antitrust injury", as defined by three decisions of this Court, and by the uniform interpretation of those decisions by the Third, Fifth, Sixth, and Eighth Circuits, does not present an issue of sufficient general effect or application to merit a fourth pronouncement by this Court. Axis does not urge that the *Brunswick* rule ought to be reversed or modified. To the contrary, Axis does not question the rule itself (Pet. at 9-10), but only argues that the Court of Appeals misinterpreted *Brunswick* and "created" a new, narrow rule.

The correctness or erroneousness of the Court of Appeals, of course, is an insufficient ground upon which to seek this Court's exercise of its certiorari jurisdiction. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). However, the Sixth Circuit did not create a new rule in this case, and that is demonstrated beyond question by the congruency of its reasoning and result with not only *Brunswick* and *Cargill*, but with the other Circuits' deci-

sions in *Alberta Gas, Bayou Bottling* and *Kansas City Southern Industries*. There is, in short, no novel or important principle of law and no unsettled points of great public interest in this case.

Certainly such an issue is not raised by Axis' argument (Pet. 14-16) that it is "the most appropriate plaintiff" to challenge Micafil's acquisition of Mechaneer. Whether a party is an "appropriate" antitrust plaintiff is a question of antitrust standing, and, as such, it was not reached by the Court of Appeals because Axis has not suffered antitrust injury. As this Court said in *Cargill*, "a showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons." 479 U.S. at 110 n.5.

Faced with a clear rule in *Brunswick*, consistently applied by the Courts of Appeal to achieve the same results, Axis' argument boils down to the contention that the Court below required that Axis, "must show that the same 'injury' could not have resulted from any set of possible facts not involving an antitrust violation." (Pet. at 17). That is not what the Court of Appeals required, and it is a gross misstatement of the decision below. The Court of Appeals required no more than what is required in *Brunswick*—that a putative private antitrust plaintiff show that the injury it suffered was an injury which was attributable to the illegality of the defendants' acts, and not merely traceable to the acts themselves.

Axis' injury here occurred *irrespective* of the reduction of competition within the United States in the sale of armature winding machines. That does not mean that another party, which may have been affected by the alleged reduction in competition, could not show antitrust injury. As the Court of Appeals recognized (870 F.2d at 1111-1112) a consumer, forced to pay more for armature winding machines because of a reduction of competition in the sales of such machines, might have such an injury, for that injury would "flow from that which made the defendants' acts unlawful." The Court of Appeals

required no more than *Brunswick* required, and as such did no more than faithfully follow this Court's teaching in *Brunswick*.

CONCLUSION

The Court of Appeals properly followed and applied *Brunswick* and *Cargill*, and its decision agrees with that of every other Circuit which has applied *Brunswick* and *Cargill* in factually similar cases. No "new rule" of antitrust injury was created, only faithful application of the existing rule.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AXIS, S.p.A.,

Petitioner,

—v.—

MICAFIL, INC.,

Respondent.

REPLY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1. Antitrust injury is a requirement in every antitrust private right of action. The target of a horizontal price fixing agreement or a boycott has rarely found proof of antitrust injury difficult. The court of appeals' decision in this action, however, would create a frequently insurmountable hurdle for even such "classic" plaintiffs. Thus, as noted in the Petition, the lower court held that the reason Axis did not suffer antitrust injury was solely because it could have suffered the same injury under hypothetical facts, contrary to the facts alleged in the complaint, that did not include any antitrust violation.

Nowhere in Micafil's response to the petition does Micafil contest this description of the test of antitrust injury imposed by the court of appeals in this action. Indeed, Micafil admits as much in its description of the appellate court's holding (Br. in

Opp. at 6). While Micafil refers to a variety of factors and cases that the court of appeals itself noted, they do not limit the standard to determine antitrust injury. That standard was the only way in which the court of appeals could affirm the dismissal of Axis' action. Simply put, the complaint alleged that Axis would not have been excluded by the patents but for the illegal acquisition. That acquisition, foreclosing Axis' entry into the U.S. winder machine market, violated the Sherman Act and the Clayton Act. It was an unreasonable restraint of trade and substantially lessened competition in the U.S. market for winder machines.[1]

Certainly neither Micafil nor the lower court contends that the patent licenses which Micafil illegally acquired with the purpose and effect of foreclosing Axis' entry into the U.S. market provide any non-statutory antitrust immunity. The patents are like any other necessary asset[2] or license, acquisition of which can violate both the Sherman Act and the Clayton Act.

2. Nor can Micafil deny the applicability of this definition of antitrust injury to all Sherman Act cases, not just acquisitions. The court of appeals clearly did not so restrict the definition

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1 Micafil's references to what "the Complaint does not allege" (Br. in Opp. at 4) imposes a standard for review of Rule 12(b)(6), Fed. R. Civ. P., dismissals that this Court rejected in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Scheuer v. Rhodes*, 416 U.S. 232, 236-37 (1973). The complaint clearly alleges that the acquisition foreclosed and continues to forecloses Axis' entry into the U.S. market. In addition, the allegations of the complaint that competition was substantially lessened in the U.S. market is certainly broad enough to include an allegation that competition would have been *increased* if Axis had acquired Mechaneer by substituting a fourth major innovative competitor for an underfinanced minor competitor. This Court's recognition of such a principle, as set out in cases cited at Petition at 12, is undisputed. While those cases may each have been Government actions, they clearly support the antitrust significance of Mechaneer as an entry vehicle for Axis.

2 E.g., the flour mill in *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

and one of the cases cited by Micafil is itself a Section 1 Sherman Act case involving alleged sham litigation.[3]

Micafil attempts to distinguish both *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), on the ground that those cases involved allegations of "predatory efforts" which are not alleged by Axis (Br. in Opp. at 8, 12). But, Micafil provides no reasoned basis, and cites no case, for requiring the plaintiff alleging predatory conduct under Section 2 of the Sherman Act to meet a different (and lesser) test of antitrust injury than the plaintiff alleging directly injurious foreclosure or exclusion from the market as a result of an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

3. Axis is in exactly the same position as the target of the boycott in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Each of the manufacturers could have independently decided not to sell to Klor's without raising any antitrust concern, but they could not agree to do so at the instance of Broadway-Hale Stores. While Klor's customers might well have suffered antitrust injury from the boycott, it would be irrational to conclude that Klor's, the target of the boycott, did not suffer antitrust injury and thus had no antitrust remedy. While Micafil contends that the court of appeals decision is of no general import, it provides no support for the proposition that the holding of a case applies only to its facts.

4. Similarly, Micafil turns *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), on its head. As noted in the Petition at 10, this Court specifically considered whether McCready lacked antitrust injury because, absent the illegal

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3 The Eighth Circuit's holding in *State of South Dakota v. Kansas City Southern Industries, Inc.*, 1989-1 Trade Cas. (CCH) 68,635 (8th Cir., June 29 1989), is simply an application of long-standing antitrust standing cases. South Dakota was merely a supplier to the target of the conspiracy; South Dakota suffered indirect injury when the conspiracy allegedly succeeded. The Eighth Circuit's additional reliance on a lack of antitrust injury is, however, an example of the potential for overbroad application of the *Brunswick* dictum in Sherman Act cases.

conspiracy, McCready's employer might have chosen insurance that did not cover psychologists' charges. This Court affirmed McCready's right to sue because McCready's injury did flow from that which made the defendants' acts unlawful. Micafil ignores the holding of *McCready* solely because this Court did not reverse *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976). But it is not *Brunswick*'s holding that is the basis of the lower court's decision. It is the *Brunswick* dictum upon which Micafil and the lower court rely.[4] As in *McCready*, the lower court and Micafil "borrow selectively from *Brunswick* . . . ." 457 U.S. at 480 n. 16.

Moreover, in *McCready*, the defendants contended that only the psychologists suffered antitrust injury. In allowing McCready to sue for her damages, this Court did not hold that the psychologists' companion litigation, see 457 U.S. at 469 n. 4, should be dismissed since they did not suffer antitrust injury. McCready's right to sue did not prevent the psychologists from having a similar right. Axis is in the same functional position as the psychologists in *McCready*. The acquisition of Mechaneer had the purpose and effect of foreclosing Axis' entry to the market, just as the refusal to pay for clinical psychologists allegedly had the purpose and effect of denying them independent access to the market. Both the psychologists and Axis suffered antitrust injury.

The court of appeals held that Axis' injury did not "flow from" that which made the acquisition illegal, solely because Axis could have suffered the same injury if facts contrary to those alleged in the complaint had occurred. Micafil violated Section 1 of the Sherman Act and Section 7 of the Clayton Act because Micafil purposefully prevented the increase in competi-

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4 Micafil's brief in opposition demeans both the Third Circuit's *Brunswick* decision and this Court's opinion in *Brunswick* reversing the Third Circuit. Micafil insists this Court's belief that "the antitrust laws do not protect a competitor from increased competition" (Br. in Opp. at 8) was so obvious that it alone would not have merited this Court's review. Yet, the "obvious" to Micafil was in fact specifically rejected by the Third Circuit in *Brunswick*. That court had allowed the plaintiff to recover treble damages based exclusively on an increase in competition.

tion that would have resulted from Axis' entry into the U.S. market by Axis' acquiring Mechaneer. The court of appeals' denial of Axis' ability to sue creates a standard which could effectively eliminate most private rights of action. Micafil simply ignores this important holding. The petition should be granted.

Respectfully submitted,

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